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No. [redacted] 59

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of New York

CIVIL ACTION No. 19–163

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE ASSOCIATED PRESS, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on January 13, 1944. A petition for appeal was filed on March 13, 1944, and is presented to the District Court herewith, to wit, on March 13, 1944.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. sec. 29), and Section 238 of the Judicial Code, as amended (36

Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. sec. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Interstate Circuit, Inc. v. *United States*, 306 U. S. 208.

Sugar Institute, Inc. v. *United States*, 297 U. S. 553.

United States v. *American Tobacco Co.*, 221 U. S. 106.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. secs. 1, 2, and 4, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

THE ISSUES AND THE RULING BELOW

The United States filed its complaint in this case in August 1942 charging The Associated Press (referred to herein as AP), its members and directors with conspiring to restrain interstate commerce in news in violation of Section 1 of the Sherman Act and with attempting and conspiring to monopolize a part of such commerce in violation of Section 2 of that act. Those named as defendants were AP, its 18 directors, and 18 of its members. The members other than those specifically named defendants were sued as a class having identical interests in the subject matter of the action and so numerous as to make it impracticable to bring them all before the court.

AP is a membership corporation, composed of the sole owners of newspapers, which collects and transmits daily reports of the world's news events. Members alone are entitled to receive these reports. The service, which includes news-pictures, features, and comics, is paid for by weekly assessments levied upon the members.

The complaint alleges that no newspaper can successfully operate without receiving the news reports of an agency equipped to gather and transmit daily reports of the world's news events; that AP, United Press Associations, and International News Service are the only agencies in the United States capable of rendering such service; and that AP ranks first among the three in public reputation and esteem, in newspaper preference, and on the basis of objective standards such as expenditures, size of staff, volume of reports, etc.

The principal charge made in the complaint is that AP, from the time of its organization in 1900, has undertaken to exclude from membership any newspaper published in the same city and "field" (morning, evening, or Sunday) as the newspaper of any existing member except with the consent of all member newspapers in such city and field. The complaint sets forth the provisions of the AP bylaws and the acts of its directors and members by which this policy of exclusion has been effected. The complaint alleges that inability to obtain AP service substantially restrains the interstate commerce of newspapers denied such service.

The complaint also charges that the agreement by and between each regular member [1] to furnish exclusively to AP and its members the local news of spontaneous origin gathered by the member and

[1] About 99% of the more than 1,200 members are regular members.

by persons in his employ violates the Sherman Act and that AP's acquisition in 1941 of all the stock of World Wide Photos, Inc., was a violation of Section 7 of the Clayton Act. The plaintiff likewise attacked as illegal, in its later motion for summary judgment, certain provisions of a contract between AP and The Canadian Press, a similar membership corporation serving Canadian newspapers.

After an expediting certificate had been filed under the Expediting Act of February 11, 1903, as amended, and a three-judge District Court had been appointed, the case was heard on the plaintiff's motion for summary judgment filed pursuant to Rule 56 of the Rules and Civil Procedures. The plaintiff and the defendants filed answers to requests for admissions, answers to interrogatories, and numerous affidavits, respectively in support of and in opposition to the motion for summary judgment.

The district court in its opinion rendered on October 6, 1943, held that the facts which were admitted or were not in substantial dispute were sufficient to dispose of all the legal issues in the case without the necessity of a trial.

On the legal issues presented, the court held, one judge dissenting, that the defendants, by combining to exclude from AP membership and service newspapers which competed with member papers, were engaged in a combination in illegal

restraint of interstate commerce in violation of the Sherman Act. It held that the agreement among AP members for the exclusive interchange of their local news constituted, when coupled with illegal membership restrictions, an unlawful restraint of interstate commerce. The court made the same ruling with respect to the provisions of the contract with The Canadian Press which prohibited that organization and its members from giving their news to anyone in the United States other than AP and its members, but it held that AP's reciprocal obligation to give its news to no one in Canada other than The Canadian Press and its members was not within the prohibitions of the Sherman Act. AP's acquisition of the stock of World Wide Photos, Inc., was held to be legal.

The court entered its final judgment, together with its findings of fact and conclusions of law, on January 13, 1944. The judgment cancelled AP's existing bylaws relating to admission of members but the injunction against adoption of new or amended bylaws restricting membership was qualified and limited by certain provisos. The judgment cancelled the bylaw provision by which all regular members agreed to withhold the local news which they gather from persons other than AP and its members and it cancelled the provisions of the Canadian Press contract giving AP and its members exclusive rights in

the United States to Canadian Press news reports, but these agreements were adjudged illegal and their continuance or renewal was enjoined only in connection with the concurrent existence of illegal membership restrictions.

The defendants have taken an appeal from the entire judgment except those provisions which deny relief as to AP's acquisition of the stock of Wide World Photos, Inc., and which grant certain limited stays as to the operation of the judgment.

THE QUESTIONS ARE SUBSTANTIAL

The district court's judgment contains a proviso that the judgment shall not prevent the adoption of new bylaws restricting admission to membership in AP provided that members competing with an applicant shall not have power to impose, or dispense with, any conditions on his admission and that the bylaws shall declare that an applicant's competition with an existing member in the same city and field shall not be taken into consideration in passing upon his application.

The limited scope of the prohibition against new membership restrictions has been assigned as error by the Government. It submits that where most of the leading concerns in an industry have combined to obtain advantages which flow from common action and to exclude competitors from participation therein, all power to exclude

other members of the industry should be barred. The Government also submits that, in any event, the qualified and limited prohibition against new membership restrictions contained in the district court's judgment will not effectively prevent continuance or renewal of the combination which the court adjudged to be illegal. The issues thus raised not only involve the adequacy of the relief granted, a question of critical and even central importance in many equity proceedings under the Sherman Act; they also involve the substantive meaning of the statute as applied to the particular combination in which the defendants have been engaged.

The substantial character of the question presented, even if judged solely from the standpoint of the adequacy of the relief granted, is clear. Under the judgment, at least by its terms, there are only two conditions which new bylaws restricting admission to membership must meet. The conditions are so phrased that there is ambiguity as to whether they prohibit the incorporation in new bylaws of different and more onerous admission requirements where there is a member newspaper, then where there is not, in the same city and field as the applicant's paper. The district court frankly recognized that the efficacy of the relief which it was granting depended, in final analysis, upon the defendants' good faith in observing the purposes and intent of its judgment.

The court in its opinion said, with reference to the required declaration, that an applicant's competition shall not be taken into consideration in passing upon his application: "It is, of course, true that the members may disregard the last provision in practice." The court added, "but that is not to be assumed."

The Government has assigned error to the holding and judgment that the agreement among AP members to interchange their local news exclusively among themselves is not, taken by itself and apart from illegal membership restrictions, an unlawful restraint of commerce or a violation of the antitrust laws. We submit that this presents a question of substance as to the application of the Sherman Act to an agreement by a preponderant part of an industry not to deal, as to important aspects of their commerce, with anyone outside of the combining group. The error assigned to the holding and judgment concerning the provisions of the contract with the Canadian Press which bar all persons in the United States other than AP and its members from Canadian Press news reports presents a like question. The district court's holding with reference to restraint upon the transmission of news from the United States to Canada also presents an important question as to the application of the Sherman Act to restraints, imposed by private combination to

limit the flow, or to channelize the movement, of commerce to or from foreign countries.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH 11, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944